IN THE

Supreme Court of the United States

October Term, 1975.

Docket # 75-1608
Docketed

R. FISKE WHITNEY,
Petitioner,

v.

VIRGINIA BRANN and HERBERT BRANN,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner, R. Fiske Whitney, *Pro Se,* the plaintiff below, respectfully prays that a *writ of certiorari* issue to review the judgment rendered by the United States Court of Appeals for the Third Circuit on February 5, 1976 which (1) unanimously affirmed the judgment of the United States District Court for the District of Delaware dated April 29, 1975 and entered in favor of the defendants after a non-jury trial of this personal injury action, and (2) affirmed by implication the pre-trial order of the court dated March 19, 1975 which, *inter alia,* denied plaintiff a jury trial.

Opinions Below.

No opinion was rendered by the Court of Appeals. The pre-trial order and the post-trial decision of the District Court are not reported, but are set forth in Ap-

pendices A and B annexed hereto. The judgment of the Court of Appeals for the Third Circuit is set forth in Appendix C annexed hereto.

Jurisdiction.

The judgment of the Court of Appeals was dated and entered February 5, 1976.

The jurisdiction of this Court to review the order and judgment of the Court of Appeals is conferred by 28 U. S. C. §1254 (1).

Questions Presented.

1. The Court of Appeals (1) affirmed a pre-trial order denying petitioner's motions for leave to amend his complaint and for a jury trial and (2) affirmed the decision in favor of defendants after a non-jury trial in the face of the fifty (50) unanswered accusations of bias and contrary misstatement by the trial judge of the evidence relied upon in arriving at his decision.

Did the Court of Appeals not sanction so great a departure from the accepted and usual course of judicial procedures by the District Court as to call for an exercise of this Court's power of supervision?

2. Was petitioner not wrongly deprived of his constitutional right to trial by jury?

3. Did the proceedings in the District Court not make a mockery of petitioner's constitutional rights to due process and a fair trial in that there prevailed an atmosphere of overt bias and partiality in favor of the large, local law firm representing defendants and its client, defendants' insurance company, and against the injured *pro se* plaintiff, citizen of a distant state?

Statement.

Petitioner, a citizen of the State of New Jersey, while visiting his daughter, Virginia Brann, her husband, Herbert Brann, and five sons at their farm in Felton, Delaware, was asked by Herbert Brann to help bridle up a newly bought half-trained horse named Rambidis and have the oldest son, Vinnie, ride. Petitioner had for years ridden, owned, bred, raised and trained horses although he was not himself a show rider. Vinnie had previously only sat on Rambidis without saddle or reins each time until he was thrown off.

As the horse was encouraged, from the front, to walk towards and into a circular enclosure, petitioner walked to the left of the horse with his right hand over the right side of the horse's shoulder holding the right rein, and with his left hand holding the left rein. Petitioner was manipulating the reins to conform to the route as would be done by a rider so as to teach the horse to be guided. Petitioner had seen this done regularly by professional trainers, and had done this himself in the handling of many partly-trained horses, all with no injury to the handler.

Suddenly, the horse while walking forward, and without stopping its forward progress, threw its body sideways to the left, knocking petitioner down, rolling on and crushing his chest, breaking his right shoulder and four ribs.

All of the Branns had seen Rambidis while walking or running suddenly throw itself sideways into a roll, performing this trick either when it was circling on a lunge line, suddenly jerked by Mr. Gibson, its previous owner, or when the horse was running free in circles in a corral. Virginia Brann, on direct, told also of another older horse Gibson had similarly trained to perform the same trick.

Petitioner believed that a cause of action lay because of mistakes of judgment by the Branns, mistakes of judgment like the causes of most accidents, mistakes against which the Branns bought insurance. Petitioner instituted suit on the eve of the end of the statutory period allowed.

Petitioner was a citizen of the State of New Jersey; the accident occurred in, and the Branns were citizens of, the State of Delaware; there was diversity of citizenship. Petitioner sued for $250,000. Jurisdiction in the U. S. District Court exists by virtue of 28 U. S. C. paragraph 1332.

Through "oversight and ignorance" petitioner failed to make timely demand for a jury trial. Eight days before the trial date, after researching the law and cases, petitioner filed a motion to amend his complaint to clarify the allegations about the nature of the dangerous propensity of Rambidis, to add causes of action and to amplify certain allegations, because these amendments appeared necessary. Petitioner also moved for a jury trial at the discretion of the Court and demanded a jury trial as a matter of law at the time of a pleading.

All of petitioner's motions were denied by Judge Latchum's Order and opinion dated March 19, 1975, annexed hereto as Appendix I.

A two-hour trial of the issue of liability was had. The twenty-one (21) page Findings of Fact, Conclusions of Law and Judgment, signed by Chief Judge Latchum, following trial and submission of briefs, was dated April 29, 1975, and is annexed as Appendix B.

On appeal, no oral argument was permitted and no opinion accompanied the affirmance.

The Reasons for Granting the Writ.

(1) One man wrongly substituted his own dictation for the proper procedures of justice.

The record, as per docket items #10 thru #20 both inclusive and #24 and #25, portrays a plaintiff *pro se,* disabled, with his business affairs neglected, in financial difficulties, tardy in pretrial matters, moving, because of previous oversight and ignorance, for a jury trial as a matter of discretion under Rule 39(b) of the Federal Rules of Civil Procedure and moving for what was and proved during the subsequent trial to be proper required amendments to his pleadings, concerning which motion, Rule 15 says: "and leave shall be freely given, where justice so requires." Upon the granting of those amendments, the accompanying demand for a jury trial should have been granted as a matter of law as per Rule 38(b).

Judge Latchum's denials of these motions, which denials in essence denied petitioner his rights under the Seventh Amendment of the Constitution were, by themselves, such departures from the accepted and usual course of judicial proceedings as to properly call for a reversal by the United States Court of Appeals.

As Chief Judge of the six judges in the District Court, Judge Latchum pre-empted unto himself this case and all fact finding and decision making, wrongly denied a jury, and improperly retained and biasedly exercised the jury's functions making decisions based throughout, *statedly,* on contrarily misstated testimony, as petitioner's main appeal brief demonstrated seriatim in thirty consecutive numbered paragraphs.

This is a far departure from the accepted and usual course of judicial procedure, requiring reversal in the

United States Court of Appeals, or failing such reversal, requiring exercise of the United States Supreme Court's power of supervision.

(2) There was no dispute about the theory of the case or about the applicable law.

The three briefs and the Findings of Fact, Conclusions of Law and Judgment (docket items #'s 28, 29, 30 and 31) portray agreement among the parties and the lower court as to the applicable law, the theory of the case, the events leading to the accident as recited in "Statement," *supra,* and the fact that the case arose out of "an *unusual accident* involving a horse owned by the defendants" (Judge Latchum's Findings 96a).* (Italics added.)

It was undisputed that, under applicable law, liability could be established either by proving absolute liability with certain limited scienter, or by proving ordinary liability with limited scienter and negligence, always, of course, without contributory negligence on the part of plaintiff, and that, if liability was established defendants might prove that the Delaware guest statute (25 Del. C, 1953, §1421) barred recovery. It was also undisputed that, according to applicable law, just as injuries inflicted by a wild animal create absolute liability, so also injuries inflicted because of a dangerous propensity in a domestic animal like Rambidis create absolute liability, providing that "persons of ordinary prudence, witnessing the events seen and heard by the defendants would have had (*sic*) known or realized that Rambidis had any such propensity for danger as alleged," as Judge Latchum put it in his Findings of Fact, Conclusions of Law and Judgment (111a).**

*Numbers in parentheses followed by an "a" refer to the pages of the Appendix for the Court of Appeals.

**The applicable law and citation of cases on absolute liability for injuries inflicted because of a dangerous propensity of a do-

(3) By misstatements of what petitioner as plaintiff below had to prove and by contrary misstatements of the testimony, Judge Latchum arrived at a verdict the opposite of what it should have been, derived as it was from what is possibly the most contrived, fraudulently intended and wrong Findings of Fact, Conclusions of Law and Judgment in the history of the United States Federal Courts.

During the five (5) weeks between the two (2) hour trial and the decision, Judge Latchum, in order to support a decision against petitioner, invented:

1. An unwarranted amplification of what petitioner had to prove, and

2. Twenty-seven (27) crucial alterations of the evidence plus eight (8) items of expert's evidence nowhere to be found in the record, concerning which no expert was ever qualified and no cross-examination was afforded, to where all the material evidence was changed so that it came to prove the opposite of what it proved at the trial. (All documented from the record in petitioner's Brief for Plaintiff-Appellant and not denied.)

On this basis a decision was arrived at!

Petitioner's complaint alleged simply that "Plaintiff was caused to sustain injuries when the horse rolled over onto him" (3a). Judge Latchum's decision raises a

(footnote continued):
mestic animal was quoted in petitioner's post-trial memorandums pp. and in his "Brief for Plaintiff-Appellant", Section I of the "Argument." It was undisputed that the liability in the instant case was stronger than that in all cited cases where liability was upheld because the potential of the dangerous propensity here was so damaging and so unexpected. The swinging hammer-like crush of the horse's body, as forward momentum was converted, exerted a pressure on petitioner's chest many times the pressure of the horse's thousand pound dead weight. And this "time bomb", "unusual" dangerous propensity to suddenly plunge sideways while moving forward was so unexpected in a domestic animal bought for a child!

"straw-man" by wrongly adding his clause starting with "whenever" thus misrepresenting what had to be proved:

> "5. First, Plaintiff has failed to prove by a preponderance of credible evidence that Rambidis in fact possessed the alleged dangerous habit of falling and rolling over *whenever* her rein was pulled to the left" (Decision 105a). (Italics added.)

This unjustified qualification about Rambidis's falling over only when her "rein" was pulled reduces the probative value to petitioner's case of the testimony adduced that "It was runing around and it just fell over on the side" (Vincent Brann, direct 76a) and that it would fall, "Just as she would go around the corner" (Virginia Brann, direct 80a) the context of both of which statements indicates that Rambidis performed its trick while untethered as well as when on a lunge line, as is elsewhere testified. Also this unjustified qualification is used scathingly and biasedly to suggest that petitioner had a responsibility to prove that Rambidis's dangerous propensity was taught by Gibson originally on a lunge line, a matter about which opposing counsel and the court inquired extensively on cross examination. That Gibson taught the trick originally on a lunge line is probably true, but it is no part of petitioner's required proof to make a case.*

Petitioner had to prove and *did prove that Rambidis had the dangerous propensity* to, while going forward suddenly plunge sidewise into a roll, a most "unusual" trick. Petitioner, as the record shows, even with his not

*Petitioner was biasedly criticized in the decision for not calling Gibson to testify about teaching the trick "upon pulling the rein." Petitioner supplied duly qualified expert testimony and was used as an expert by opposing counsel and by the court for more words of testimony than he produced on direct. Neither opposing counsel nor the court produced any expert witness at the trial; if criticism was due anyone for not calling Gibson, it was due the defense who obviously chose to avoid exposing itself to further damaging testimony about the dangerous propensity.

inconsiderable experience with horses, had never seen a horse able to perform this trick which he characterized as a "time bomb" (see quote, *infra*).

Concerning the exact limited scienter that petitioner had to prove, Judge Latchum contrarily misstated the testimony, as follows:

> "The plaintiff admitted that such training would have been very unusual, that the defendants with their limited experience would not have recognized such training or potential danger from seeing Gibson pull a horse off its feet, and that even he, with his wider experience, would not have realized the significance of Gibson's actions" (Decision 102a).

On this second matter to be proved to establish liability, namely the certain limited scienter, the *only evidence* was the uncontradicted testimony of petitioner on two occasions:

> "This was an unusual thing that if I had been told about the horse being pulled over, possibly I would have not realized it, but I am quite sure I would have, if they had told me about the horse being pulled over that way and falling over in the corral number three by itself. I was not told that these occurrences had taken place and I believe that this was like a time bomb" (Whitney 27a), and

> "I believe that a reasonably prudent person with average experience would have deduced from seeing the horse run around the rectangular corral '3' and then throw itself down and from seeing Mr. Gibson pull the horse over that there was a potential danger of injury and I believe that a reasonably prudent person would have told me about it. I was not told" (Whitney 58a).

This testimony proved without dispute and without any other beclouding evidence, exactly the opposite of what Judge Latchum sought to prove by his contrarily false misstatement of the trial testimony in 102a.

The evidence indicated that there was no contributory negligence as defined by applicable law and there was no dispute with this conclusion by defense counsel or by the lower court.

In arriving at decision on the last possible bar to liability and recovery, namely whether petitioner was a "guest without payment," Judge Latchum says:

> "The evidence in this case is unclear whether the plaintiff gave his daughter any money towards his expenses on the date of his injury" (Decision-114a).

This is an absolutely contrary-to-fact misstatement of the *only* and the *undisputed* testimony of both sides that payment was made "on every occasion" (Whitney, direct 31a) and "every time" (Virginia Brann, direct 82a-83a).

If Judge Latchum's misstated view of the complaint and of the actual testimony were corrected in only the above three instances (and there are twenty-seven such instances of misstatements) it would alter the nature and force of the evidence so dramatically as to require judgment for the plaintiff, an opposite final decision.

Petitioner's main appeal brief, on pages 6 through 21 inclusive, analyzed seriatim, Judge Latchum's decision on the pre-trial motions, his conduct of the trial and his 21-page decision. Petitioner charged over fifty acts of bias and misstatements by the court of the material evidence relied upon to support the court's conclusions, biased prejudgment of issues, misrepresentation of applicable law and of what had to be proved, misconstrual of evidence, improper interference with testifying so as to suppress evidence, fabrication of actually false evidence of a type such as should come only from experts, baseless assumptions confusions and non sequiturs in the court's argument, concentration on matters irrelevant to the dispositive issues at bar and other unjudicial acts. The answering "Brief for Appellees" failed to refute or deny or even answer *any of these grave and specific charges.*•

The charges of fifty (50) acts of bias and misstatements of material testimony stand unrefuted and, even aside from the fact that the true record shows petitioner fully proved his case, the fifty (50) undenied charges should have prompted the Court of Appeals to reverse and remand for retrial.

The misstatements of the testimony are too contrary, are too numerous, and are too completely pervasive of all crucial matters to be other than *contrived.* This perversion of the truth and of justice goes far beyond the limit where one can say "These were just unintentioned mistakes." There was fraudulent intent.

This permeating contrived pattern of bias *all* directed against petitioner and *all* in favor of the large local law firm representing defendants and their insurance company improperly affected the decision and created an atmosphere in which a fair trial was impossible.

•In its section "Argument V the Plaintiff's Opening Brief," the Brief of Appellees starts "Much of the argument of the plaintiff is an attack on defense counsel and Judge Latchum. *Rather than go through each and every comment made by the plaintiff in that regard, it is appropriate to make a few references to points that have been raised in the record for the first time on this appeal.*" (Italics added for emphasis.) The remainder of the Argument V the Plaintiff's Opening Brief is taken up by improperly raised argument with seventeen (17) pages of appendix all of which argument and 17 page appendix was properly stricken by the Court of Appeals on motion by the petitioner.

Jerome Frank, in his classic *Courts on Trial,* page 413 (Princeton, 1949), cautions us that "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness."

Judge Latchum denied petitioner such a fair trial and, by his contrived misstatement of all material testimony, added the dimension of contrived willfulness to fix his decision in this matter, which, before trial, he had wrongly pre-empted unto himself.

This nation, on its two hundredth birthday, cannot afford another Watergate type cover up or a Dreyfus affair. Such as this cannot be buried.

Democracy and your petitioner cry out that the Supreme Court exercise its power of supervision.

The petition for a writ of certiorari should be granted.

Dated: New York, New York,
April 26, 1976.

Respectfully submitted,

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APPENDIX A.

Decisions on Motions.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

R. FISKE WHITNEY,
Plaintiff,

v.

VIRGINIA BRANN and HERBERT BRANN,
Defendants.

Civil Action No. 74-11

ORDER

The Court having considered plaintiff's motion filed herein on March 18, 1975 (1) to amend the complaint to add to Paragraph 5 of the complaint and (2) for a jury trial of this action, it is

ORDERED:

1. Plaintiff's motion to amend the complaint and for a jury trial is hereby denied for the following reasons:

This case was filed in this Court on January 18, 1974 (Docket Item 1) and has been at issue since February 7, 1974 (Docket Item 5). On January 31, 1975 this case was set for a non-jury trial on the issue of liability to begin on March 26, 1975 (Docket Item 23).

Plaintiff's present motion filed a week prior to trial comes too late. The proposed amendment to Paragraph

5 of the complaint does not introduce any new issues or causes of action than those which are already asserted by the plaintiff in his original complaint. The proposed amendment amounts to nothing more than cumulative pleading. Plaintiff's proof at trial will in no way be affected by the proposed amendment. Plaintiff would gain nothing by the allowance of the proposed amendment and will in no way be prejudiced by its denial. On the other hand, permitting the amendment would have the effect of postponing the trial of this case in order to permit the defendants time to answer. This unjustified delay of the non-jury trial would be prejudicial to the defendants since it was set for trial almost two months ago and the case has been pending at issue for over a year.

As to plaintiff's motion for a jury trial, it is clear that neither the plaintiff nor the defendants made a demand for a jury trial pursuant to Rule 38(b), F.R.Civ.P., after the commencement of this action or within ten days after service of the last pleading directed to the issues. Consequently, under Rule 38(d), the failure of a party to serve a demand for a jury trial as required by the rule constitutes a waiver by him of trial by jury. Thus, the right to jury trial was waived by the plaintiff on February 17, 1974. The question here is whether the Court in its discretion should at this late date order a trial by jury under Rule 39(b), F.R.Civ.P. The Court declines to grant a jury trial in view of the facts that the waiver has existed for more than a year, the case has been scheduled for a non-jury trial since January 31, 1975, and to grant that request a week before the scheduled trial date would disrupt the Court's calendaring of jury and non-jury cases. Furthermore, the legal issue as to whether the Delaware Property Guest Statute, 25 Del. C. §1421, bars recovery in this case, as raised by defendants' deferred motion for summary judgment, is a wholly legal issue which could be better tried to the Court than to a jury.

Dated: March 19, 1975.

JAMES L. LATCHUM
Chief Judge

APPENDIX B.

Findings of Fact, Conclusions of Law and Judgment.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

R. FISKE WHITNEY,

Plaintiff,

v.

VIRGINIA BRANN and HERBERT BRANN,

Defendants.

Civil Action No. 74-11

R. Fiske Whitney, *pro se.*

Richard W. Pell of Tybout, Redfearn & Schnee, Wilmington, Del., for defendants.

Wilmington, Delaware
April 29, 1975.

LATCHUM, Chief Judge.

The plaintiff, R. Fiske Whitney, seeks to recover $250,000 from the defendants, who are his daughter and son-in-law, Virginia and Herbert Brann, for personal injuries which he allegedly sustained as a result of an unusual accident involving a horse owned by the defendants.

The separate issue of liability was tried by the Court without a jury on March 26, 1975. After carefully con-

sidering the sufficiency and weight of the testimony[1] adduced at trial, the demeanor and relationship of the witnesses who testified and the post trial memoranda filed by the parties, the Court makes the following findings of fact, conclusions of law and judgment.

Findings of Fact

1. The plaintiff is a citizen of the State of New Jersey, the defendants are both citizens of the State of Delaware,[2] and the amount in controversy, exclusive of interest and costs, exceeds $10,000.

2. In the latter part of 1971, the defendants, having sold their home in Tenafly, New Jersey, moved to a small farm that they had purchased near Sandtown, Delaware. Shortly thereafter, they bought a cross-breed pony or horse,[3] named Rambidis for $100, from their neighbor, Mr. Gibson, as a riding horse for their eleven year son, Vinnie Brann ("Vinnie").

[1]Since the parties chose not to order a transcript, the trial testimony has not been transcribed.

[2]In his complaint, the plaintiff merely alleges that he is a "resident" of New Jersey and that the defendants are both "residents" of Delaware. However, the defendants admitted in their answer that diversity of "citizenship" exists between the parties and the evidence adduced at trial demonstrated to the satisfaction of the Court that diversity exists and that the plaintiff's failure to explicitly plead the citizenship of the parties is attributable solely to his failure as a *pro se* plaintiff to recognize the jurisdictional significance between "resident" and "citizen." See *Krasnov v. Dinan*, 465 F. 2d 1298 (C.A. 3, 1972) and *Freedman v. Zurich Insurance Co.*, 264 F. Supp. 550 (W.D. Pa. 1967).

[3]Rambidis was variously described in the testimony as a pony or horse, a cross-breed of Shetland pony and Arabian stock. She had a rather full body, short legs, weighed in the neighborhood of 1,000 lbs. and had a height described from three and half to four and half feet at the saddle.

3. On Sunday, January 30, 1972, the plaintiff and his wife made a social visit to the farm. While so visiting, Vinnie asked his grandfather, the plaintiff, to come outside to watch him ride his horse which he had ridden on a number of occasions before.

4. Plaintiff agreed and proceeded outside with Vinnie and Herbert Brann to a corral adjacent to the horse stable. Vinnie coaxed Rambidis into the stable, haltered her and led her into the corral where she was bridled.

5. Vinnie usually rode Rambidis in a fenced in riding circle located a short distance from the corral. The plaintiff had been told by Herbert Brann that Rambidis was "green broke," meaning she was not completely broken-in. The plaintiff took the reins from Vinnie, who was leading Rambidis in the corral, and stated that Rambidis could be trained to follow directions by the pull of the reins without actually riding her. He then demonstrated his method by standing to the left of Rambidis and placing his right arm over her neck and shoulders to grasp the right rein in his right hand while holding the left rein in his left hand. In this manner he moved Rambidis forward at a walk while walking beside her and guided her head in the direction he wished her to proceed by the pull of the left or right rein.

6. After proceeding through the corral gate, plaintiff pulled on the right rein to turn her to the right in order to proceed toward the riding circle. After the turn he evened her up, proceeded a short distance, directed her to the left and then to the right again through the gate of the riding circle. As he again pulled on the left rein after entering the riding circle, Rambidis without warning fell to the left, knocking the plaintiff down and rolled upon plaintiff's chest. Vinnie testified that the horse just fell on top of his grandfather and that her feet actually went up in the air as she fell on her left side. Herbert Brann testified that either the horse stumbled or that the

plaintiff stumbled and pulled Rambidis over onto him but that he was really not sure what happened.

7. Until the time of the accident, there was no evidence that Rambidis had ever rolled over, stumbled or fallen on or near anyone or that she had any propensity in that regard. Before Rambidis was purchased, Mr. Brann had once seen Mr. Gibson, her previous owner, pull Rambidis off her feet when he was circling her at a run at the end of a long rope. He had also observed Mr. Gibson do the same thing with one or more of Gibson's other horses. Mrs. Brann never observed Mr. Gibson pull a horse over in this manner but she had some recollection that she had heard that he had done so. On one other previous occasion she and Vinnie had observed Rambidis when running around alone in the corral fall as she rounded a corner. However, Mrs. Brann made no connection between that fall and the information she had learned that Gibson had one time pulled a horse over.

8. At no time before the accident did either defendant believe or have reason to believe from their observations of Rambidis that she had a proclivity to fall upon or roll upon any person standing nearby. To the contrary, they were sufficiently satisfied with Rambidis' harmlessness that they freely allowed their young son, Vinnie, to care for and ride Rambidis despite Mrs. Brann's general fear of all horses.[4] While Mrs. Brann testified that she was aware that Rambidis sometimes "nipped" and in her opinion was somewhat "wild," she nevertheless warned her father of these tendencies before the accident.

9. The plaintiff, on the other hand, claimed he was knowledgeable and had considerable experience with horses of which the defendants were aware. He had done a great

[4]It was obvious from Mrs. Brann's testimony that she had very little experience or familiarity with horses, had never ridden one and was generally distrustful and fearful of such animals.

deal of riding, owned a horse farm and at trial attempted to qualify himself as an expert witness on the training and management of horses. The plaintiff was also well aware at the time of the accident that the defendants were not very knowledgeable and had very little experience in the handling or care of horses.

10. Testifying as an alleged expert,[5] plaintiff stated that it was his opinion that Rambidis did not stumble because if she had stumbled she would have fallen forward and would not have rolled upon the plaintiff with her feet off the ground. Instead, he speculated in retrospect that by pulling Rambidis over Gibson had actually trained her to roll over. The plaintiff admitted that such training would have been very unusual, that the defendants with their limited experience would not have recognized such training or potential danger from seeing Gibson pull a horse off its feet, and that even he, with his wider experience, would not have realized the significance of Gibson's actions. Indeed, the plaintiff on one occasion did see Gibson pull a horse off its feet (although he did not know whether or not it was Rambidis) and he just assumed that Gibson was aggravated with the horse so that he failed to relate the event with any danger. When Mr. Brann observed Gibson do this, he thought Gibson was just "showing off."

11. Following the accident, Rambidis' potential for causing injury was recognized as evidenced by the fact that she was sold for a loss and in response to Mrs. Brann's

[5]While obviously the plaintiff had more experience with horses than the defendants, the Court is unconvinced that his experience was sufficient to qualify him as an expert on the subject. Furthermore, although he was permitted to give his opinion as to how the accident happened, since he was representing himself at trial, the Court is unable to attribute much weight to his opinion and theories as to how or why the accident occurred.

intensified antagonism to horses in general, even a very gentle and well-trained horse which the defendants owned was sold.

12. The plaintiff admitted that the defendants did not willfully or intentionally mislead the plaintiff as to Rambidis' disposition.

13. There was also testimony concerning plaintiff's alleged payment for his social visits to his daughter's farm. Plaintiff testified that in recognition of the fact that the defendants had a substantially lower income after moving to the farm, he often gave his daughter financial aid to offset the expenses of his visits. While plaintiff's checks to Mrs. Brann were admitted in evidence, all were dated quite some time after the date of the accident. Mrs. Brann testified, however, that she never asked for any money, would not have charged her father for her hospitality, at times took money offered under protest and in fact her father had on occasions given her money when she lived in New Jersey before moving to the farm.

Conclusions of Law

1. Jurisdiction exists by virtue of 28 U. S. C. §1332.

2. This being a diversity suit, the tort law of Delaware where the accident occurred governs this case. ***Fulginiti v. Tocco,*** 462 F. 2d 654, 655, fn. 1 (C.A. 3, 1972).

3. Plaintiff claimed in his complaint and at trial that the defendants were negligent in failing to warn him of Rambidis' known dangerous propensity to suddenly fall and roll over on her left side onto whatever may be in her way by a simple pull to the left on the halter or bridle of the horse.

4. It has long been the established law of Delaware that the owner of a domestic animal, such as a horse, is not

liable for injuries done by it unless it was in fact and to the owner's knowledge vicious or in some manner dangerous. *Brown v. Green,* 1 Penn. 535, 42 A. 991 (Del. Super. 1899); *F. Giovannozzi & Sons v. Luciani,* 2 Terry 211, 18 A. 2d 435 (Del. Super. 1941); *Duffy v. Gebhart,* 157 A. 2d 585, 586 (Del. Super. 1960); *Richmond v. Knowles,* 265 A. 2d 53, 55 (Del. Super. 1970). Scienter or knowledge of the dangerous propensity of a domestic animal may come to an owner either from actual knowledge, from observation, or from reports made to the owner of its dangerous disposition or habits or it may be gathered or known constructively, for example, if the animal had a reputation in the neighborhood of possessing a dangerous inclination. *Friedman v. McGowan,* 1 Penne 436, 42 A. 723, 725 (Del. Super. 1898); *Barclay v. Hartman,* 43 A. 174 (Del. Super. 1896).

5. First, plaintiff has failed to prove by a preponderance of credible evidence that Rambidis in fact possessed the alleged dangerous habit of falling and rolling over whenever her rein was pulled to the left. The only suggestion of this trait was the highly speculative theorizing of the plaintiff that Gibson, her previous owner, had trained Rambidis to perform this "trick." There is insufficient factual support for any such assumption. Gibson was not called to testify in support of this theory and the one occasion, when Rambidis was observed to have been pulled off her feet by Gibson, would unquestionably have been inadequate training to teach a horse to perform such a "trick" by the simple tug of the rein. If pure speculation were in order to determine why and how the accident occurred, it would be equally reasonable to assume (1) that Rambidis had a weak left front quarter which caused her leg to give way and fall, or (2) that she simply stumbled and fell, or (3) that plaintiff stumbled and catching Rambidis off balance pulled her over. The roll after the fall is equally explained as the usual man-

ner in which a horse regains momentum for righting itself in order to get into a position to stand again. Plaintiff's pure speculation and guesswork that Rambidis possessed a dangerous trait which caused his injuries is totally inadequate to warrant fixing of liability upon the defendants. This is so because negligence is never presumed; it must be proved; and no presumption of negligence arises from the mere fact that an accident occurred. *Wilson v. Derrickson*, 4 Storey 199, 175 A. 2d 400, 401-2 (Del. Sup. 1961). Thus, the Court concludes that plaintiff has failed to carry his burden of proof with respect to one of the essential issues in this case, viz., that Rambidis in fact possessed the dangerous inclination to fall and roll as speculated by the plaintiff.

6. Second, even if the Court were to assume (which it legally may not do) that Rambidis had been trained to perform the trick of falling and rolling upon the tug of the left rein, the plaintiff has failed to meet his burden of proving by a preponderance of the evidence a second essential fact that the defendants had knowledge of any such dangerous trait as the performing of the trick. No credible evidence was presented to show that the defendant actually knew that Rambidis was dangerous in this respect. Indeed, the plaintiff admitted that the defendants were unaware of any such proclivity. But even in the absence of such an admission, the evidence was overwhelming that defendants were totally unaware of any such assumed propensity. First, this is shown by the evidence that the defendants allowed their son to play with and ride Rambidis many times before the accident, acts totally at odds with any assumption that the defendants knew the horse was dangerous. Second, the defendants warned the plaintiff that Rambidis was only "partially trained," sometimes "nipped" and was a "bit wild." These warnings, coupled with plaintiff's admission that there was no malice between the parties, convinces the

Court that they constituted the full extent of defendant's actual knowledge of any dangerous habit or inclination on Rambidis' part. Third, the plaintiff admitted that with defendants' limited knowledge of horses, he did not believe that knowing Gibson had pulled her over and Mrs. Brann seeing Rambidis fall once in the corral meant anything to them.

7. The plaintiff also appears to contend that since Mr. Brann had observed Rambidis pulled off her feet by Gibson while he was running her in a circle at the end of a long rope and since Mrs. Brann had noticed Rambidis fall as she turned a corner while running around alone in her corral was enough to imply constructive knowledge to them, as reasonable persons, of the alleged dangerousness of Rambidis. This contention has as its sole basis plaintiff theorizing as an alleged horse expert that if a horse is pulled off its feet once it is easier to pull the horse over a second time, that eventually with such training the horse can be pulled over with the slightest tug on the rein or no signal at all, and that reasonable persons should have realized this was a trick taught to Rambidis by Gibson and that the trick was dangerous.

There are three fatal defects to plaintiff's contention. First, the plaintiff has completely failed to prove to this Court that he was sufficiently experienced in the training of horses to testify as an expert. To the contrary, he admitted he was a "mediocre horseman," not "full fledged." While he had occasionally observed the training of young horses and had discussed their training with full-time horse trainers, he failed to indicate he had any personal experience with or ever witnessed teaching such a "trick" to horses as here contended. Indeed, the first time he had ever observed a horse pulled off its feet was when he had seen Gibson do it and he had then assumed that Gibson was simply annoyed at the horse.

Second, even if a horse could be trained in the manner theorized by the plaintiff, there is no evidence of record that either defendant saw or heard that Rambidis was progressively easier to pull over. In fact, neither defendant testified to seeing Rambidis repeatedly pulled over as would be necessary under the plaintiff's theory. Moreover, there is no evidence that the fall witnessed by Mrs. Brann was in any way connected to the alleged training by Gibson and instead not connected to some latent physical weakness or characteristic of the horse.

Third, even if the defendants had seen Rambidis pulled over repeatedly by Gibson the plaintiff has failed to prove that a reasonable man should connect this with any danger resulting from the horse rolling over on its own or with a slight tug when a man was in close proximity to the animal so as to cause the injuries alleged in this case. There is no evidence that the horse before the accident ever rolled over from a slight tug. There is no evidence that the horse before the accident ever rolled over near a man so as to suggest a potential danger. There is no evidence that a man of ordinary prudence should be aware of the plaintiff's self-serving training theory; to the contrary even the plaintiff was unaware of the theory at his deposition before trial and there was an admission at trial by the plaintiff that even then he possibly would not have realized the danger if told of all the events witnessed by the defendants.[6]

[6]While the plaintiff placed considerable emphasis that after the accident Mrs. Brann stated she should have known Rambidis would do something like that, the Court, in consideration of all the factors in this case, concludes that this statement should be treated as a retrospective affirmation by Mrs. Brann of her general fear of horses and not as an admission that she, as a reasonable person, should have prospectively been convinced from the fragmentary evidence concerning Rambidis that the horse was dangerous in the respect alleged.

Accordingly, the Court concludes that the plaintiff has failed to prove by a preponderance of the evidence that, persons of ordinary prudence, witnessing the events seen and heard by the defendants would have had known or realized that Rambidis had any such propensity for danger as alleged.

8. For the reasons above stated, the Court concludes that the plaintiff has not sustained his burden of proving that (a) Rambidis possessed the dangerous propensity alleged or (b) even if Rambidis did have such a dangerous proclivity, that the defendants had actual or constructive notice and knowledge thereof which would render them liable to the plaintiff.

9. Finally and alternatively, even if the plaintiff had succeeded in sustaining his burden of proving that Rambidis had the dangerous proclivity alleged, that the defendants had knowledge of the danger and were found to have been negligent in failing to warn plaintiff thereof, plaintiff's recovery would nevertheless be barred by 25 Del. C., 1953, §1421, which at the time of the accident provided:

> "No person who comes onto premises occupied by another person as his guest without payment shall have a cause of action for damages against the occupier of the premises unless such accident was intentional on the part of the occupier or was

caused by his wilful or wanton disregard of the rights of others.'"

A "guest without payment" has been construed by the Delaware courts to be akin to a "social guest" recognized at common law as distinguished from "business invitee." *Facciolo v. Facciolo Construction Co.*, 317 A. 2d 27, 28 (Del. Sup. 1974); *Urbanski v. Walker*, 281 A. 2d 491, 492 (Del. Sup. 1971). Thus, when a person confers some economic or other benefit of value on the owner of premises, he is not usually considered a guest without payment. *Richmond v. Knowles*, 265 A. 2d 53, 56 (Del. Super. 1970); *Hoksch v. Stratford Apartments, Inc.*, 283 A. 2d 687, 688 (Del. Super. 1971). An important distinction, however, must be made between those cases involving an "enforceable agreement" to pay expenses in connection with a visit and those in which there is merely a voluntary payment of expenses not in liquidation of a contractual liability but in return for favors of a host as a matter of social amenity, as for illustration, by paying for a meal. In the latter cases the person is considered

[7]The statute was amended effective July 10, 1973 and now reads (25 Del. C., Rev. 1974, §1501):

> "No person who enters onto the premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the willful or wanton disregard of the rights of others."

Although this amendment represents some significant changes these changes do not affect this case.

In addition, the accident occurred on January 23, 1972 and, accordingly, is not governed by the terms of §1501. See *Pietuszka and Gallucio Builders, Inc., v. McTaggart*, 333 A. 2d 164 (Del. Sup. 1975).

a "guest without payment" and the statute applies. *Asmuth v. Kemper*, 174 A. 2d 820, 823 (Del. Super. 1961).[8]

The evidence in this case is unclear whether the plaintiff gave his daughter any money towards his expenses on the date of his injury. But even if he did, the Court is unable to conclude that he is beyond the application of the statute. The evidence shows: that the defendants' farm was never run for the purpose of hosting paying guests; that none of defendants' visitors ever paid to stay at the farm; plaintiff was never asked for money and at times his daughter accepted only over protest. Plaintiff never gave any fixed amount to defendants and he was welcome as a father and grandfather with or without his gifts. Furthermore, money was given at other times as gifts to the defendants' children as one would normally expect from a grandfather.

As a result of this evidence and in view of the applicable law, the Court finds that any money given to Mrs. Brann was not in accordance with any prearranged agreement or in liquidation of a contractual liability but rather as a matter of social amenity and pure gratuity to his family. The Court also concludes from the evidence that plaintiff's visit conferred no benefit of value upon defendants which others in like situations would have to pay. Accordingly, the Court concludes that the plaintiff on the date of the accident was a "guest without payment" within the meaning of 21 Del. C., 1953, §1421 when visiting the defendants' farm. Thus, to recover plaintiff was required to prove by a preponderance of the evidence that the injuries he sustained as a result of the accident were intentional on the part of the defendants or were caused

[8]While the Court in *Asmuth* was considering the Delaware automobile guest statute, 21 Del. C. §6101, the Delaware Supreme Court has equated the term "guest without payment" used in that statute to the same term in §1421. *Stratford Apartments, Inc., v. Fleming*, 305 A. 2d 624, 626 (Del. Sup. 1973).

by their willful or wanton[9] disregard of his rights. Since there was absolutely no evidence of this type of conduct on the part of the defendants, plaintiff has failed to sustain his burden under the statute.

10. Finding that the plaintiff has failed to establish by a preponderance of the evidence that the defendants are legally liable for the accident and injuries sustained by the plaintiff, the Court will enter judgment against the plaintiff and in favor of the defendants.

JUDGMENT

It is ORDERED that judgment is hereby entered in favor of the defendants and against the plaintiff.

Dated: April 29, 1975.

JAMES L. LATCHUM
Chief Judge

[9] "Wilful conduct, by definition, includes an element of actual or implied intent to cause injury. Wanton conduct occurs when a person, though possessing no intent to cause harm, performs an act which is so unreasonable and dangerous that an imminent likelihood of harm or injury to another is reasonably apparent. *Wagner v. Shanks*, Del. Supr., 194 A. 2d 701, 707 (1963). Such conduct is often characterized by a conscious indifference to the consequences of one's acts or by an 'I-don't-care-a-bit-what-happens' attitude. *McHugh v. Brown*, Del. Supr., 11 Terry 154, 125 A. 2d 583, 586 (1956)." *Schorah v. Carey*, 318 A. 2d 610, 612 (Del. Super. 1974).

APPENDIX C.

Judgment Order.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1731
No. 76-1044

R. FISKE WHITNEY,
Appellant,

v.

VIRGINIA BRANN and HERBERT BRANN,
Appellees.

Appeal From the United States District Court
for the District of Delaware
(D. C. Civil Action No. 74-11)

Submitted Under Third Circuit Rule 12(6)
on January 19, 1976

Before HUNTER, BIGGS and GARTH, *Circuit Judges*

R. FISKE WHITNEY
Pro Se

RICHARD W. PELL
TYBOUT & REDFEARN
Attorneys for Appellees

Judgment Order

After consideration of all contentions raised by the appellant and the appellees,

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Date: Feb 5 1976

By the Court

JAMES HUNTER, III, *Circuit Judge*

Attest:

THOMAS F. QUINN, *Clerk*

Certified as a true copy and issued in lieu of a formal mandate on February 27, 1976.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellees as follows:

Brief $116.10